# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 320

EDWARD EARL MASSENGILL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 242 Misc.

WILLIAM A. MCCLENNY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 5, 1965. The petition for a writ of certiorari in No. 242 Misc. was filed on June 2, 1965. By order of the Chief Justice, the time for filing a petition for a writ of certiorari in No. 320 was extended to and



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including July 4, 1965. The petition for a writ of certiorari in No. 320 was filed on July 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the evidence showed a single conspiracy.
2. Whether the testimony of a co-conspirator should have been excluded (raised in No. 242 Misc.).

## STATEMENT

Petitioners and four codefendants were indicted in the United States District Court for the Eastern District of Virginia for conspiracy to violate various federal laws relating to illicit liquor (R. 2–9).[1] Before trial, a severance was granted to codefendant Rountree (Tr. 11). At the conclusion of the evidence, the trial court directed the acquittal of codefendant Bonnie Minton (Tr. 452). The jury convicted the remaining defendants (Tr. 515). Petitioners were each sentenced to imprisonment for a period of five months and to pay a fine of $3,000 (1 R. 36–27). The court of appeals affirmed.

The evidence showed that in August 1962, government witness Billy Ray Mason began to make deliveries of non-taxpaid whiskey for petitioner Massengill (Tr. 225–227). In October 1962, Massengill told Mason that petitioner McClenny had called him several times asking for whiskey (Tr. 229). Mason thereafter delivered whiskey for Massengill to McClenny Motors at Suffolk, Virginia, making twelve to fifteen such trips and receiving six to seven hundred

[1] "R" and "Tr." refer to the record and transcript in No. 242 Misc.

dollars, which he would turn over to Massengill, for each load of approximately twenty cases (Tr. 234–235, 241). McClenny told Mason that he was also getting whiskey from other sources (Tr. 242). Co-conspirator Rufus Massengill assisted in making deliveries to McClenny (Tr. 242), and codefendant Jarvis helped unload on one occasion (Tr. 234, 236). On the last trip which Mason made, in January 1963, he had tire trouble, and petitioner McClenny came to his assistance (Tr. 237–241).

On January 8, 1963, Mason helped to load the car of Rufus Massengill with whiskey (Tr. 243). Rufus Massengill was arrested on that day and $700 was found in his possession (Tr. 352–353). On the same day, January 8, 1963, a Ford truck with the words "Plumbing and Heating" painted on the side was seized with 144 one-half gallons of non-taxpaid whiskey in glass jars (Tr. 195–198). A similar truck had been inspected in the hands of a dealer by codefendant Jarvis in September 1962, and a few days thereafter a man identifying himself as John C. Wise of Suffolk, Virginia (the name in which the truck was registered), had obtained it in exchange for another car. The dealer had called McClenny Motors and talked with someone who identified himself as petitioner McClenny before he closed the deal because Wise's title certificate had been notarized by McClenny (Tr. 80–89). The telephone company records showed a call from McClenny Motors to the Division of Motor Vehicles in November 1962 (Tr. 35–38), and a clerk of the division remembered receiving a telephone call in November from a John C. Wise, requesting that

the title (which had previously been returned undelivered) be mailed to him at Route 1, Suffolk (Tr. 97–102).

On February 6, 1963, more than five hundred gallons of non-taxpaid whiskey were seized on a farm rented under the name of Gene Revis (Tr. 198–201, 219–220). Jarvis admitting using that name in renting another farm on which 960 gallons of whiskey were seized on February 20, 1963 (Tr. 360, 373–374, 380–381). Jarvis and severed defendant Rountree were at the time loading whiskey into a Chevrolet which had been left for repairs at McClenny Motors by a Mrs. Johnson. In October 1962, codefendant Reeves had told Mrs. Johnson the car needed more repairs. In January 1963, Jarvis had been seen backing it out of the McClenny garage, in the presence of McClenny (Tr. 161–163, 359–360, 385–389).

There was also testimony concerning three events which occurred before petitioner Massengill was shown to have participated in the conspiracy: (a) In January 1962, Reeves purchased approximately two hundred one-gallon Coca Cola jugs and loaded them on to a U-Haul-It trailer registered to McClenny Motors. He then drove to McClenny Motors, unloaded some of the jugs and drove off on a highway leading to North Carolina. McClenny, questioned about this by police, said that Reeves was hauling the jugs for somebody in North Carolina (Tr. 125, 129–133). (b) On the early morning of March 2, 1962, a red-and-cream 1956 Ford was seen on the streets of Suffolk with no front license plate. When an officer turned to pursue it, the Ford drove off but was found

shortly thereafter with a flat tire and its driver gone. It contained twenty-three gallons of non-taxpaid whiskey. Reeves had previously been seen driving this car, and the cap found in the seat was similar to one which Reeves had been seen wearing. The Ford was registered to McClenny Motors (Tr. 134–137, 154–155, 159). (c) On June 6, 1962, officers made a search pursuant to warrant of the farm of one Minton, Jarvis' stepfather, near Windsor, Virginia. Non-taxpaid whiskey was discovered in an outbuilding. Mrs. Minton told the officers that she would not let her husband have the whiskey inside the house, but there was no evidence implicating her in its possession (Tr. 177–182, 192). Minton, who had been acquitted on a State liquor charge involving this incident, was not charged in this case (Tr. 190). The trial court directed Mrs. Minton's acquittal and instructed the jury that she had been eliminated from the case (Tr. 452, 487).

## ARGUMENT

1. When the fragments of evidence in this case are put together, they show a single conspiracy involving the distribution of illicit whiskey in the area around Suffolk, Virginia. At the center of this operation was petitioner McClenny, and he was assisted by codefendants Jarvis and Reeves. Joining the conspiracy some time after its inception, as a wholesale supplier from unlicensed distilleries in North Carolina, was petitioner Massengill. The fact that Massengill joined the conspiracy at a later date does not, of course, relieve him of responsibility for prior acts

of his co-conspirators. *Hernandez* v. *United States*, 300 F. 2d 114, 122 (C.A. 9); *United States* v. *Doran*, 299 F. 2d 511, 514 (C.A. 7), certiorari denied, 370 U.S. 925; *United States* v. *Dardi*, 330 F. 2d 316, 329 (C.A. 2). Nor does his entry into the illegal venture divide the single unlawful combination into two. Even if the evidence of prior acts by other conspirators was inadmissible against him, it was proper for the prosecution to put it into evidence against the other defendants with a limiting instruction to the jury. No such instruction was requested here.

The only evidence which was not connected to the conspiracy concerned the seizure of whiskey at the Minton farm. The jury was instructed that Mrs. Minton had been eliminated from the case. Inasmuch as no other defendant was mentioned in connection with this evidence, and no broader instruction was requested, no prejudice resulted from the admission of this evidence.

2. Mason testified on cross-examination that a sheriff came to see him several times on a bad-check charge, that some evenings they talked for several hours, and that thereafter the sheriff put him in touch with State liquor authorities (Tr. 315, 320–321). There is no merit to petitioner McClenny's argument that these facts required the exclusion of Mason's testimony. These were matters properly brought out on cross-examination as bearing on Mason's credibility, and their weight was for the jury. The jury was properly instructed regarding the factors to be considered in determining credibility and was told

to weigh the testimony of Mason with care since he was an accomplice (Tr. 506–508).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1965.

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